MOTION FILED
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No. 98-822

IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

FRIENDS OF THE EARTH, et al.,
Petitioners,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Public Citizen seeks leave to file the attached brief *amicus curiae* in support of the petition for a writ of certiorari. The petition seeks review of a decision of the Fourth Circuit which, based on its interpretation of this Court's decision in *Steel Co. v Citizens for a Better Environment*, 118 S. Ct. 1003 (1998), dismissed as moot an appeal of a civil penalty awarded in a citizen suit arising under the Clean Water Act. The Fourth Circuit also set aside an award of attorneys' fees, even though plaintiffs had indisputedly caused respondent Laidlaw to halt its continuing violations of the Clean Water Act through successful prosecution of the lawsuit. In direct conflict with ten other federal courts of appeals, the Fourth Circuit forbids an award of attorneys' fees in statutory fee-shifting cases on a "catalyst" theory. The Fourth Circuit's rule is also out of line with this Court's attorneys' fees jurisprudence.

Public Citizen is a non-profit, consumer advocacy organization with nearly 150,000 members nationwide. Since 1971, Public Citizen has been active in the courts, in Congress, and before regulatory agencies concerning the enforcement of a wide-range of health and safety, environmental, and other consumer legislation. Public Citizen has represented plaintiffs in litigation over federal fee-shifting statutes in environmental and other cases. *See Melkonyan v. Sullivan*, 501 U.S. 89 (1991); *Jones v. Brown*, 41 F.3d 634 (Fed. Cir. 1994); *Chesapeake Bay Foundation v. United States Dep't of Agriculture*, 11 F.3d 211 (D.C. Cir. 1993), *cert denied*, 115 S. Ct. 315 (1994); *Dunn v. Florida Bar*, 889 F.2d 1010 (11th Cir. 1989), *cert. denied*, 498 U.S. 811 (1990). Public Citizen also served as counsel on the petition for certiorari from the *en banc*

Fourth Circuit decision holding that a fee award under a catalyst theory is never permissible. *See S-1 & S-2 v. State Bd. of Educ.*, 21 F.3d 49, 51 (4th Cir.), *cert. denied*, 513 U.S. 876 (1994). In all of these cases, Public Citizen has sought to further the policies behind federal fee-shifting legislation: providing a means for ordinary citizens, who otherwise could not afford counsel, to enforce the mandates of federal law.

The petition presents three questions for review: two on the merits and the third concerning attorneys' fees. *Amicus* agrees with petitioners that review should be granted on all of the questions presented. However, Public Citizen confines this brief to why, even if certiorari is not granted on the first two questions, the Court should grant certiorari on the third question concerning attorneys' fees. *First*, the Fourth Circuit's rule against catalyst fee awards is inconsistent with decisions of this Court defining "prevailing party" status. *See Texas State Teacher's Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782 (1989); *Hewitt v. Helms*, 482 U.S. 755, 761 (1986); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Maher v. Gagne*, 448 U.S. 122, 129 (1980). *Second*, the Fourth Circuit's rule is in direct conflict with decisions of ten courts of appeals holding that statutory fees may be awarded under a "catalyst" theory. *Third*, certiorari should be granted to ensure the uniform and just application of federal law. The Fourth Circuit's rule against catalyst fee awards places a significant obstacle to citizens living in Maryland, Virginia, North Carolina, and South Carolina seeking to use the "private attorney general" fee provisions to enforce federal laws as Congress intended. Because the accompanying *amicus* brief focuses on the question of why certiorari should be granted on the third question, and no other party or *amici* is likely to emphasize that issue, we ask that Public Citizen be granted leave to file the accompanying brief. Petitioners consent to the filing of this brief but respondent

Laidlaw opposes.

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF AMICUS

The interest of *amicus* Public Citizen is set out in the foregoing motion for leave to file this brief *amicus curiae*.[1]

STATUTORY BACKGROUND

The relevant provisions of the Clean Water Act, 33 U.S.C. §§ 1251, *et seq.*, are set forth in the petition at pages 2-3 and in the petition's appendix at 10a. Section 505(a) of the Clean Water Act, 33 U.S.C. § 1365(a), authorizes any citizen to bring suit to enforce certain violations of the Act. That section specifically empowers the courts to issue injunctive relief and impose civil penalties. The Clean Water Act provides that the court may award attorneys' fees and costs "to any prevailing or substantially prevailing party." 33 U.S.C. § 1365(d). The attorneys' fee provision in the Act is similar to that in dozens of other federal environmental, consumer, and civil rights statutes.

STATEMENT OF THE CASE

This case involves the successful efforts of three citizen groups to force respondent Laidlaw, operator of a hazardous waste incinerator, into compliance with the limits for discharge

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[1] Pursuant to Supreme Court Rule 37.6, Public Citizen states that no counsel for a party has authored this brief in whole or in part, and that no person or entity other than Public Citizen has made a monetary contribution to the preparation or submission of this brief.

of specified pollutants in its Natural Pollutant Discharge Elimination System ("NPDES") permit. The Clean Water Act prohibits the discharge of any pollutant by any person unless discharge is in compliance with a permit issued pursuant to one of the permit programs established by the Act. Section 402(a) of the Clean Water Act, 33 U.S.C. § 1342(a), provides for the issuance of NPDES permits to allow the discharge of wastewater. Each permit includes limits on discharge and requires that the permittee monitor and report its compliance with these limits. *Id.* In this case, Laidlaw violated its permit hundreds of times before plaintiffs filed suit, discharging mercury, lead, nickel, arsenic, cadmium, chromium, and zinc into the North Tyger River. *Friends of the Earth, Inc., et al., v. Laidlaw Enviro. Services*, 956 F. Supp. 588, 593 (D.S.C. 1997). The cause of the discharge violations was an inadequate wastewater treatment system and Laidlaw's failure to adequately control mercury in its operations. *Friends of the Earth, Inc., et al., v. Laidlaw Enviro. Services*, 890 F. Supp. 470, 478 (D.S.C. 1995).

The procedural history of the case is set forth in detail in the Petition for a Writ of Certiorari at pages 3-7. For the purposes of this brief, only a few key facts are relevant.

First, Laidlaw continually violated its permits for a six-year period preceding, and for many months following, plaintiffs' initiation of this action. 956 F. Supp. at 613-21. During the six-month period prior to the suit, Laidlaw violated its mercury limits 103 times, including violations as much as 13 times over its permit limit. 890 F. Supp. at 619-21.

Second, only after plaintiffs filed suit did Laidlaw take steps to install the proper filters and equipment to control its illegal discharges. In July 1992, a month after plaintiffs filed

suit, Laidlaw installed new carbon absorption equipment. 890 F. Supp. at 483. Six months later, Laidlaw installed additional equipment that aided the performance of the carbon filters in removing mercury. *Id.* As a result, the number and severity of its mercury violations dropped though there were still 13 violations after the complaint was filed. 956 F. Supp. at 621.

Third, after numerous pre-trial proceedings, the district court conducted a three-day trial in July and August 1995 on liability and relief. 956 F. Supp. at 592. In January 1997, the district court entered judgment for plaintiffs, assessing a penalty of $405,800 (payable to the U.S. Treasury) against Laidlaw, and awarding plaintiffs their attorneys' fees and costs. *Id.* at 610-11. The district court concluded that, since Laidlaw had by that time achieved substantial compliance with its permit, there was no need for an injunction, but that Laidlaw's penalties and payment of costs would be sufficient deterrents to prevent Laidlaw from violating its permit in the future. *Id.*

Fourth, the Fourth Circuit dismissed the appeal and remanded with directions to dismiss the case as moot based on this Court's decision in *Steel Co.* *See* Petition at App. 8a-9a. The court of appeals held that, because plaintiffs had not appealed the denial of injunctive relief, and the penalty award could not redress any injury suffered by plaintiffs, plaintiffs no longer had standing. *Id.* at 7a. Significantly, the court of appeals held that it could not award plaintiffs their attorneys' fees and costs because the law of the Fourth Circuit specifically forbids an award of fees under a "catalyst" theory. *Id.* at 9a n.5.

Thus, although plaintiffs were successful in forcing Laidlaw to comply with its Clean Water Act permit after years of violations and performed precisely the role Congress intended

citizens to serve under the Clean Water Act, in the end no penalties were assessed, and plaintiffs were denied their fees and costs incurred over six years of vigorous litigation, including numerous pre-trial motions, a three-day trial, and appeals.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit's categorical rejection of the well-established and widely-accepted "catalyst" theory misreads the language and history of the statutes awarding fees to "prevailing parties," contravenes this Court's endorsement of "catalyst" theory in a series of cases, and conflicts with the interpretation of the "prevailing party" language adopted by every other court of appeals to consider the issue. The Fourth Circuit's narrow interpretation of the "prevailing party" language was first announced in *S-1 and S-2 v. State Board of Educ.*, 21 F.3d 49 (*en banc*) (interpreting the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988 ("Section 1988")), *cert. denied*, 513 U.S. 876 (1994). Later that same year, the "no catalyst" rule was applied in another Section 1988 case, *Clark v. Sims*, 28 F.3d 420 (4th Cir. 1994), and most recently was extended to this case arising under the Clean Water Act. The Fourth Circuit's rule dramatically narrows the grounds for fee awards to plaintiffs seeking to vindicate federal civil rights or enforce federal environmental or consumer statutes. There is nothing in this Court's cases, including its decision in *Farrar v. Hobby*, 506 U.S. 103 (1992), that warrants the Fourth Circuit's restrictive view of the term "prevailing party."

The divergence between the Fourth Circuit and the decisions of this Court, and the split between the Fourth Circuit and the ten other courts of appeals, are sufficient reasons to warrant a grant of certiorari, but there is an additional reason why certiorari should be granted. This case is exceptionally

important to the just and uniform administration of federal law. The Fourth Circuit's application of its "no catalyst" rule for attorney's fees places an enormous obstacle to ordinary citizens seeking access to justice and enforcing federal statutory rights. There are over 100 federal fee shifting statutes, all of which predicate an award of fees on some degree of success by the plaintiffs. *See Marek v. Chesney*, 473 U.S. 1, 43-51 (1985) (appendix listing federal statutes authorizing award of attorneys' fees); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 684 (1983) (Clean Air Act); *see also Ramos v. Lamm*, 539 F. Supp. 730, 755-57 (D. Colo. 1982) (table). The rationale underlying these "citizen suit" statutes is essentially the same -- to enable those who have been wronged to seek redress and to encourage the vindication of federal policy by authorizing "private attorney generals." *See Evans v. Jeff D.*, 475 U.S. 717, 741 (1986) (Section 1988 gives "victims of civil rights violations a powerful weapon that improves their ability to employ counsel, to obtain access to the courts and therefore to vindicate their rights"); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (Title II of 1964 Civil Rights Act); *see also Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 127 (2d Cir. 1991) (Clean Water Act). Without the possibility of a fee award after a successful suit, citizens seeking to enforce their statutory rights will have a difficult time retaining counsel and these rights will exist in name only -- out of reach to citizens. *See* H.R. Rep. No. 1558, 94th Cong. 2d Sess. 1-3 (1976) (report accompanying enactment of Section 1988).

I. THE FOURTH CIRCUIT'S "NO CATALYST" RULE CONTRAVENES THE DECISIONS OF THIS COURT.

This Court has in a number of cases endorsed the "catalyst" theory of attorneys' fee awards by recognizing that a final judgment on the merits is not a necessary prerequisite to achieving the status of a "prevailing party." For instance, in *Hewitt v. Helms*, 482 U.S. 755 (1987), the Court expressly acknowledged a "catalyst" theory under Section 1988. "It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under section 1988." *Id.* at 761. As if to reject the very theory later adopted by the Fourth Circuit, the Court further noted that, "[a] lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment -- *e.g.*, a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor." *Id.* at 760-61. After all, what one seeks in a lawsuit is not a judicial pronouncement for its own sake but to change the behavior of the defendant in some way. *Id.* Thus, "if a defendant, under pressure of the lawsuit, alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit, the plaintiff will have prevailed." *Id.*

Similarly, in *Maher v. Gagne*, 448 U.S. 122 (1980), the Court stated that "[n]othing in the language of section 1988 conditions the district court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated." *Id.* at 129. Rejecting the argument that a settlement -- without a judgment on the merits -- cannot afford "prevailing party" status under section 1988, *Maher* quoted a passage of the Senate Report accompanying the

enactment of section 1988. *See id.* ("[F]or purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.") (quoting S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976)). *See also Hanrahan v. Hampton*, 446 U.S. 754, 756-57 (1979) (per curiam) (recognizing, in reliance on the legislative reports, that a person may "in some circumstances be a 'prevailing party' " if his rights are vindicated "without formally obtaining relief"); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (prevailing party if "she succeeds on any significant issue in litigation which achieved some of the benefit the parties sought in bringing suit").[2]

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[2] The House Report accompanying Section 1988 explicitly endorses treating cases in which a defendant's "voluntary compliance" affords plaintiffs the requested remedy no differently than cases in which the plaintiffs obtain relief through a favorable judgment on the merits, a settlement, or a consent decree.

> The phrase "prevailing party" is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits . . . . If the litigation terminated by consent decree, for example, it would be proper to award counsel fees [citations omitted]. A "prevailing party" should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion. Similarly, after a complaint is filed a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity that no formal relief, such as an injunction, is needed.

(continued...)

Despite this Court's decisions on "prevailing party" status, all of which endorse the "catalyst" theory, the Fourth Circuit derives a contrary rule from this Court's decision in *Farrar v. Hobby*, 506 U.S. 103 (1992). But *Farrar* is not to the contrary. In fact, the Court in *Farrar* did not consider or rule on the validity of the "catalyst" theory. Rather, the issue in *Farrar* was whether a fee award of $280,000 was reasonable, assuming the plaintiff had technically prevailed through an award of $1 in a suit seeking $17 million. In the course of a general discussion on fee awards under Section 1988, the Court stated that, to be a prevailing party, a "plaintiff must obtain at least some relief on the merits of his claim," an "enforceable judgment against the defendant," or "comparable relief through a consent decree or settlement." *Id.* at 111. Citing to the test articulated in *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989), the Court explained that a "plaintiff prevails when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." 506 U.S. at 111.

The Fourth Circuit incorrectly construed the comments

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[2](...continued)
H.R. Rep. No. 1558, 94th Cong., 2d Sess. 7 (1976). The legislative materials accompanying the 1987 amendments to the Clean Water Act similarly support the view that a "prevailing party" is one who settles the case as surely as one who litigates to judgment. *See* Petition for Certiorari at 22 (citing S. Rep. No. 50, 99th Cong., 1st Sess 33 (1985); S. Rep. No. 233, 98th Cong., 1st Sess. 24-25 (1983)). Congress's only concern was that parties who lost not receive fee awards. *Id; see also Ruckelshaus*, 463 U.S. at 682.

in *Farrar* about obtaining relief through an enforceable judgment, consent decree, or settlement as an exhaustive list, foreclosing the possibility of a fee award where the plaintiff achieves relief through voluntary compliance by the defendant. Writing for a one-vote *en banc* majority in *S-1 and S-2*, Judge Wilkinson held that a "prevailing party" must achieve success by virtue of "a court's authority," and not by any other means. 21 F.3d at 51. Nothing in *Farrar*'s holding suggests that prevailing party status may not be achieved in other ways and, in fact, the context makes clear that the list in *Farrar* is not exclusive and that the core inquiry remains the one articulated in *Texas State Teachers, Hewitt,* and *Hensley* -- alteration of the legal relationship between a plaintiff and a defendant in a way that directly benefits the plaintiff. 506 U.S. at 111. As the Third and Seventh Circuit have noted, "it is not likely that the Supreme Court would overturn such a widespread theory without even once mentioning it, particularly when it was inapplicable to the case at hand." *Baumgartner v. Harrisburg Housing Authority*, 21 F.3d 541, 546-50 (3d Cir. 1994); *see also Zinn by Blankenship v. Shalala*, 35 F.3d 273, 274-76 (7th Cir. 1994). In sum, the decision in *Farrar* cannot be read to foreclose a catalyst theory of fee recovery.

II. THE FOURTH CIRCUIT'S "NO CATALYST" RULE CONFLICTS WITH DECISIONS OF TEN OTHER COURTS OF APPEALS.

Ten other courts of appeals have, post-*Farrar*, confirmed the vitality of the "catalyst" theory of recovery. *Compare S-1 and S-2*, 21 F.3d at 51 *with Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc.*, 138 F.3d 351, 357-58 (8th Cir. 1998) (Clean Water Act); *Maduka v. Meissner*, 114 F.3d 1240, 1241 (D.C. Cir. 1997) (Equal Access to Justice Act ("EAJA")); *Marbley v. Bane*, 57 F.3d 224, 233-35 (2d Cir. 1994) (Section

1988); *Kilgour v. City of Pasadena*, 53 F.3d 1007, 1010-11 (9th Cir. 1995) (Section 1988); *Zinn by Blankenship v. Shalala*, 35 F.3d 273, 274-76 (7th Cir. 1994) (Section 1988); *Beard v. Tedska*, 31 F.3d 942, 950-52 (10th Cir. 1994) (Individuals with Disabilities Educational Act); *Baumgartner v. Harrisburg Housing Authority*, 21 F.3d 541, 546-50 (3d Cir. 1994) (Section 1988); *American Council for the Blind of Colorado, Inc. v. Romer*, 992 F.2d 249, 250-51 (10th Cir.)(Section 1988), *cert. denied*, 510 U.S. 864 (1993); *Craig v. Gregg County, Texas*, 988 F.2d 18, 20-21 (5th Cir. 1993) (Voting Rights Act); *Paris v. United States Dep't of Housing and Urban Development*, 988 F.2d 236, 238 (1st Cir. 1993) (EAJA and Fair Housing Act); *Citizens Against Tax Waste v. Westerville City School*, 985 F.2d 255, 257-58 (6th Cir. 1993) (Section 1988); *Pembroke v. Wood County, Texas*, 981 F.2d 225, 231 n.27 (5th Cir.) (Section 1988), *cert. denied*, 508 U.S. 973 (1993). Most of these cases explicitly reject the argument accepted by the Fourth Circuit in *S-1 and S-2*, and the decision below, that *Farrar* overruled *sub silentio* the prior decisions of this Court and the law of the circuits that embrace the catalyst theory of recovery.

These cases all emphasize that the key question is one of causation, *i.e.* whether the suit caused the defendant to change its conduct to the plaintiff's benefit, rather than the form by which defendant's compliance takes place. *See, e.g., Public Citizen Health Research Group v. Young*, 909 F.2d 546, 550 (D.C. Cir. 1990); *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978). Once the conditions of causation and substantial benefit to the plaintiff are satisfied, there is no need for the additional requirement that there be a favorable judgment, or that the change in conduct or law be judicially mandated or formalized by judicial decree. Thus, in *Baumgartner*, the Third Circuit explained that "if a plaintiff already has achieved what is sought through litigation, there is no need for a judgment to enforce

that which has been achieved, particularly when there is no possibility that there will be any need for enforcement in the future." 21 F.3d at 547. "[I]f defendants could deprive plaintiffs of attorneys' fees by unilaterally mooting the underlying case by conceding to plaintiffs' demands, attorneys might be more hesitant about bringing ... these civil rights suits, a result inconsistent with Congress's intent in enacting section 1988." *Id; accord Zinn*, 35 F.3d at 274-76. Courts award statutory fees in cases even where the merits of the claims are moot. *See Jean v. Nelson*, 863 F.2d 759, 766, *aff'd*, 496 U.S. 154 (1988) (EAJA); *Little Rock School Dist. v. Pulaski County Special Sch. Dist. No. 1*, 17 F.3d 260, 262 (8th Cir. 1994) (Section 1988); *Collins v. Romer*, 962 F.2d 1508, 1513 (10th Cir. 1992) (Section 1988); *Morscott, Inc. v. City of Cleveland*, 936 F.2d 271, 272-73 (6th Cir. 1991) (same). Environmental fee-shifting cases have typically followed this approach. *See, e.g., Environmental Defense Fund v. Reilly*, 1 F.3d 1254, 1257-58 (D.C. Cir. 1993) (Resource Conservation and Recovery Act). Thus, a plaintiff may be a prevailing party in the absence of a judicial determination on the merits. *See, e.g., Wilderness Society v. Babbitt*, 5 F.3d 383, 386 (9th Cir. 1993) (EAJA); *Atlantic States Legal Foundation*, 933 F.2d at 128 (Clean Water Act).

Under the Fourth Circuit's prohibition on "catalyst" fee awards, however, plaintiffs are deprived of any award of attorneys' fees even though they would be entitled to such a fee award virtually everywhere else in the country. Thus, citizens of the four states within the Fourth Circuit are significantly circumscribed in their ability to take advantage of the fee shifting provisions under federal civil rights, environmental, and consumer statutes by comparison with citizens of the other states. In the context of the Clean Water Act, the conflict becomes even more striking and unfair: Pennsylvania citizens

living along a river that crosses from Pennsylvania into Maryland may recover the costs incurred for suing to abate water pollution although Maryland citizens, perhaps only a few miles away, may not. Assuring uniformity on the standard for awarding statutory fees in lawsuits that are brought across the country is critical to guaranteeing equal application of the law.

III. THE FOURTH CIRCUIT'S "NO CATALYST" RULE IMPAIRS ENFORCEMENT OF FEDERAL CIVIL RIGHTS, ENVIRONMENTAL, AND CONSUMER STATUTES.

The Fourth Circuit's rule that attorneys' fees may never be awarded under a catalyst theory makes more difficult enforcement of federal environmental, consumer and civil rights statutes using the "private attorney general" provisions. Time and time again, Congress has recognized that, without the means to retain counsel and mount a successful prosecution of a citizen suit, there will likely be substantial underenforcement of federal statutory mandates. The fee-shifting provisions in civil rights and environmental statutes serve similar purposes. "Section 1988 was enacted to insure that private citizens have a meaningful opportunity to vindicate their rights protected by the Civil Rights Acts." *Pennsylvania, et al., v. Delaware Valley Citizens Council for Clean Air, et al.*, 478 U.S. 546, 559 (1986) (citing *Hensley*, 461 U.S. at 429). Unless reasonable attorney's fees can be awarded for bring civil rights actions, many legitimate claims will not be redressed. *Id.* at 560. Citizens who bring actions to abate pollution perform a public service and "in such instances the courts should award costs of litigation to such party." *Id.*

The Fourth Circuit's rule significantly circumscribes the availability of attorneys' fees under federal fee shifting statutes,

and contravenes Congress's intent by depriving many deserving litigants of fees despite their success in vindicating federal statutes. If the Fourth Circuit's rule is allowed to stand, it will virtually assure that fewer citizen suits -- either under the civil rights statutes or the environmental statutes -- will be brought in that circuit. Combined with the Fourth Circuit's holding that a defendant may moot out the entire complaint, including an assessment of civil penalties, by dragging out the case until it brings itself into compliance, and the enormous expense involved in litigating these cases to a successful resolution, citizen groups will not be able to find attorneys able to muster the financial resources to bring these cases contrary to Congress's manifest intent..

CONCLUSION

The petition for a writ of certiorari should be granted. Although granting certiorari on all three questions presented by petitioner would be appropriate, even if the Court is not inclined to grant certiorari on the first two merits question, *amicus* urges the Court to grant certiorari on the third question to settle the conflict in the circuits over the award of attorneys' fees under a "catalyst" theory.

Respectfully submitted,

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